First, a mere three months have passed since the enactment of the 1996 Act, and there have been no changes in the CMRS market in that short time to justify the reclassification of CMRS providers as LECs. The experience of Vanguard and other CMRS providers continues to demonstrate that consumers use CMRS service to supplement their use of the landline local exchange in meeting their communications needs. Consequently, CMRS services remain an imperfect, higher-cost substitute for local service provided via landline facilities. While this situation may not persist indefinitely, the Commission should recognize the continued differences between CMRS and LEC providers by maintaining the regulatory distinctions between the two services contemplated in the 1996 Act.

Moreover, Congress already has provided a standard by which the Commission can determine whether to treat CMRS providers as LECs in the form of the requirements of Section 332(c)(3) of the Communications Act.[42/] This section provides that no state or local government can engage in rate regulation of a CMRS operator unless the Commission grants such regulatory authority. This authority may only be granted based upon a showing that:

> (1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (2) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.[43/]

The Commission should apply this test in determining whether to subject a CMRS provider to the obligations imposed upon all LECs by the 1996 Act. Congress already has set these

42/ 47 U.S.C. § 332(c)(3).

43/ *Id.*

requirements as the standard for imposing one form of regulation on CMRS providers and they are well-suited for the additional task of determining whether other regulations should be applied as well.

Use of this test would ensure regulatory parity by subjecting CMRS providers to LEC obligations under the 1996 Act only where CMRS operators actually provide widespread, mass market substitutes for traditional LEC services. Applying this measure also would be consistent with the Congressional determination that CMRS providers could be, but are not yet, LECs. Consequently, the Commission should defer subjecting CMRS providers to LEC obligations under the 1996 Act until CMRS providers meet the test contained in Section 332(c)(3) of Communications Act. In any event, there is no public interest reason or factual basis for treating CMRS providers as LECs at this time.

B. The Commission Should Not Apply the Resale Obligations of Incumbent LECs to CMRS Providers.

In crafting the regulatory scheme of the 1996 Act, Congress carefully differentiated the resale obligations appropriate for incumbent LECs from the obligations of other telecommunications carriers. Specifically, Section 251(c)(4)(A) requires incumbent LECs, and only incumbent LECs, "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers[.]"[44/]

The limited application of this wholesale pricing requirement reflects Congress's recognition that incumbent LECs' dominant market power requires stricter measures to be

44/ 47 U.S.C. § 251(c)(4)(A).

taken to ensure the development of local competition with regard to incumbent LECs than for telecommunications carriers generally. While carriers in a competitive market have incentives to maximize usage of their networks by offering resale at attractive rates, incumbent LECs have the incentive to thwart potential competition by offering resale only at rates that preclude resellers from earning a profit. This incentive to limit the resale of incumbent LEC services has particularly pernicious effects in the early stages of competition, when competing carriers will be more dependent on the resale of the incumbent LECs' facilities. Recognizing the anti-competitive incentives of incumbent LECs in the resale market, Congress established a wholesale pricing obligation to attempt to assure that the resale of incumbent LEC services remains a viable market strategy for competing carriers.

The Commission should not extend the resale obligations of incumbent LECs to CMRS providers in this proceeding. Unlike incumbent LECs, CMRS providers have no incentive to price resale at unattractive rates because CMRS providers have no dominant market share to protect.[45/] Instead, market forces assure that CMRS resale will take place at reasonable rates because CMRS providers have an incentive to maximize the use of their networks.[46/]

Moreover, a wholesale pricing obligation is not required to foster CMRS resale competition, as vigorous competition in the CMRS resale market presently exists. For

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45/ Unlike resellers of incumbent LEC services, who may be using resale as a transition to their own facilities-based offerings, CMRS resellers do not threaten to take customers away from a facilities-based CMRS provider.

46/ In those situations where a cellular provider does attempt to prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of its services, such restrictions would violate the cellular provider's obligations under the Commission's rules. *See* 47 C.F.R. § 22.901(e) (cellular resale requirements).

example, Vanguard already competes with the other cellular provider in each of its service areas for CMRS resale business.[47] Competition in the CMRS resale market also will increase significantly with the introduction of new Personal Communications Services ("PCS"). Cellular carriers, including Vanguard, can expect the introduction of significant new resale competition as three to six new PCS licensees begin to provide service in every market across the country.[48] One early indication of the scope of this new competition has been provided by the announcement of NextWave, the largest winner of licenses in the FCC's most recent PCS auction, that its business strategy will focus primarily on bulk resale of capacity, rather than the provision of service directly to consumers.[49] Given the existence of competition in the CMRS market at the present time, competition which can be expected to increase greatly with the near-term roll-out of PCS services, there is no need for the Commission to extend the wholesale pricing obligations of incumbent LECs to CMRS providers in this proceeding.

47/ Vanguard historically has provided resale services to resellers and, based on pending negotiations, anticipates that it will enter into a series of additional resale agreements in the near future.

48/ ESMR providers also may create additional resale competition.

49/ *See Nextwave Plans Carriers' Carrier Strategy for Its PCS Network*, COMM. DAILY, May 14, 1996, at 3.

V. TO THE EXTENT THAT THE COMMISSION REQUIRES CMRS PROVIDERS TO OBTAIN INTERCONNECTION THROUGH THE PROVISIONS OF SECTIONS 251 AND 252, TRANSPORT AND TERMINATION MUST BE AVAILABLE ON REASONABLE TERMS AND CONDITIONS. [*Notice* Parts II(C)(5), III(A), ¶¶ 226-244, 264-268].

Key points:

- If the Commission chooses to subject LEC/CMRS interconnection to the interconnection provisions of the 1996 Act, the cost for transport and termination of traffic should be bounded on one end by a LEC's demonstrated long run incremental cost and on the other end by bill and keep arrangements.
- Any charge for transport and termination should be capacity-based, rather than usage-based, to reflect the fixed nature of most termination costs.
- Existing LEC/CMRS interconnection agreements were "negotiated" under coercive circumstances and should be reviewed under the standards that apply when states arbitrate disputes, not under the "public interest" standard for voluntary agreements.

As described in detail above, there is no legal or policy reason to require CMRS providers to obtain interconnection pursuant to the provisions of the 1996 Act. Section 332 gives the Commission exclusive jurisdiction over LEC/CMRS interconnection and nothing in the 1996 Act changes this. *See supra* Part III. Consequently, to promote competition by wireless providers the Commission should complete its pending *CMRS Interconnection* proceeding and mandate bill and keep reciprocal compensation arrangements for LEC/CMRS interconnection.

If the Commission nevertheless chooses to subject LEC/CMRS interconnection to the provisions of Sections 251 and 252, it must interpret these provisions in a manner that promotes the development of competition for LECs from facilities-based CMRS providers. Specifically, the Commission must establish unambiguous pricing standards for the transport and termination of traffic that recognize Congress' preference for facilities-based competition. The Commission also must require review of existing interconnection "agreements" under standards that will remedy the lopsided nature of those contracts.

A. If the Commission Requires CMRS Providers to Obtain Transport and Termination from Incumbent LECs Under Sections 251 and 252, the Commission Must Adopt a Framework for Negotiation, Arbitration and State Review that Is Consistent with the Goals of the 1996 Act.

Congress anticipated that there would be three basic methods by which a competitive LEC will provide local exchange service, and it imposed obligations on incumbent LECs to provide the services and facilities necessary for competitors to provide service under each of the three models. Under the first method, a new entrant provides service over its own facilities and obtains "transport and termination" from the LEC for calls originating on the new entrant's network pursuant to Section 251(b)(5).[50/] The second method contemplates that competitors will purchase interconnection and unbundled network elements from the incumbent LEC pursuant to Sections 251(c)(2) and 251(c)(3) to be used in combination with the competitor's facilities.[51/] Finally, Congress anticipated that some new entrants would provide service by reselling the service of another carrier and it therefore prohibited all LECs from placing restrictions on resale and required incumbent LECs to offer services for resale at "wholesale" rates.[52/] An individual competitor could adopt one, two or all three of these alternatives to serve its customers.

50/ 47 U.S.C. § 251(b)(5).

51/ 47 U.S.C. § 251(b)(2)-(3).

52/ 47 U.S.C. §§ 251(b)(1) and 251(c)(4)

Section 252 establishes a negotiation and arbitration model for resolution of interconnection issues between competing carriers, including pricing standards to be applied by state commissions in judging the reasonableness of the rates for the three types of services required under Section 251. Specifically, under Section 252(d)(2) the cost of transport and termination between carriers that exchange local traffic under a mutual compensation arrangement must be based on the "additional cost, if any" of termination and transport.[53/]

The Commission should interpret the pricing standard of Section 252(d)(2) to require the price for termination and transport under a mutual compensation agreement to be bounded on one side by bill and keep arrangements and on the other side by a carrier's demonstrated long run incremental cost ("LRIC").[54/] This interpretation is consistent with Congressional intent and the specific language of the 1996 Act. Congress' use of the term "additional cost" requires the Commission to adopt a standard based on some form of incremental cost, *i.e.*, the cost of a service without common costs, overhead or purported universal service subsidies. This standard is met by using LRIC to determine the ceiling of the cost of transport and termination. Bill and keep arrangements, on the other hand, specifically are permitted by Section 252(d)(2), so there can be no question of whether Congress intended for bill and keep to be part of the Commission's regulatory regime. Bill

53/ 47 U.S.C. § 252(d)(2).

54/ In this context, LRIC is the forward-looking long run cost of the additional units of capacity necessary to provide the requested transport and termination, given the existence of a LEC's current capacity.

and keep also is a reasonable approximation of the relative costs and benefits of transport and termination for carriers exchanging traffic.[55/]

This proposed cost standard also is consistent with the Congressional preference for facilities-based competition. Congress recognized that facilities-based competition is the only way to break the incumbent LECs' bottleneck control over the local exchange market. This preference is expressed most clearly in Section 271, which requires a BOC to enter into an interconnection agreement with a facilities-based competitor before the BOC can be permitted to provide in-region long distance service.[56/]

To promote facilities-based competition, the pricing provisions of Section 252 are designed to give facilities-based competitors the most favorable rates. For example, the rate for unbundled network elements under Section 252(d)(1) must be based on the cost of the element and may include a "reasonable profit." This standard plainly allows the recovery of costs that may not be included in the rate for transport and termination of traffic under a reciprocal compensation agreement. Similarly, the "wholesale" rate for services made available to resellers under Section 252(d)(3) is based on the retail rate of the service less avoided costs, a standard which also will result in the recovery of further costs that may not be recovered for transport and termination under a reciprocal compensation agreement.

55/ In this respect, the experience of Vanguard's subsidiary, Teleflex Information Systems, Inc., is relevant. Teleflex provides billing services to more than 425,000 cellular customers as well as all of American Mobile Satellite Corporation's customers. Based on that experience, Vanguard has concluded that the cost to track and bill transport and termination provided to carriers connecting to Vanguard's network would be greater than the LRIC of terminating those calls.

56/ 47 U.S.C. § 271(c)(1)(A).

In addition to these costing boundaries, the Commission also should require that any charge for transport and termination of traffic be based on capacity, not on minutes of use. As demonstrated in the *CMRS Interconnection* proceeding, the costs of terminating traffic are largely fixed and do not vary with the number of minutes of traffic terminated.[57] Thus, the most appropriate and economically efficient way to recover these costs if bill and keep is not required is a flat fee. Requiring capacity-based, rather than usage-based, pricing also is consistent with the fact that most states require local exchange service to be offered on a flat-rate basis. A potential competitor in the local exchange market will have difficulty competing with an incumbent's flat rate local exchange service if it is required to pay the LEC a usage-based charge for calls that terminate on the incumbent's network.

To the extent charges are imposed for transport and termination of traffic, companies should allocate the expenses of transport facilities based on the revenues they receive. For example, if two carriers must construct a facility to connect their switches and the charges for transport and termination are split 70-30 between the carriers, then the costs of construction should be split 70-30. The value of this approach is that it matches the costs imposed on each carrier with the benefits the carrier receives from the arrangement. It also helps to eliminate incentives for incumbent carriers to attempt to impose unreasonable costs for transport and termination or unreasonable limitations on points of interconnection.

Furthermore, incumbent LECs should not be permitted to impose limitations on the technical terms of interconnection. Any interconnection arrangement that an incumbent LEC provides today should be made available to all telecommunications carriers, both in terms of

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57/ *See, e.g.*, Comments of Teleport Communications Group, Inc., CC Docket No. 95-185, at 15-17 (filed March 4, 1996).

technical facilities and points of interconnection. At the same time, there is no justification for any incumbent LEC claim that existing forms of interconnection are technically infeasible. Existing technical terms of interconnection should be the minimum technical standards applied to LECs, not the ceiling on what they are required to provide. Indeed, there should be a presumption that any form of interconnection that is requested is technically feasible.[58/] Accordingly, the Commission should impose a high threshold for LEC claims that a requested technical arrangement is not technically feasible.

B. Any State Review of Existing Interconnection Agreements Should Be Based on the Standards for Arbitration, Not on the General "Public Interest" Standard that Governs Voluntary Agreements Under the 1996 Act.

If the Commission determines that LEC/CMRS interconnection is governed by the provisions of Sections 251 and 252, it must review existing as well as future interconnection agreements under these provisions. Given the involuntary nature of virtually all existing LEC/CMRS interconnection agreements, any state review of these agreements must be judged under the standards that apply to arbitrations, rather than the standards applicable to voluntary agreements.

58/ A carrier requesting interconnection has little incentive to request a technically-infeasible form of interconnection. As a practical matter, a form of interconnection that is infeasible for one carrier is likely to be infeasible for all similar types of carriers, especially in populated areas. In addition, if a form of interconnection truly is technically infeasible, then the requesting carrier will, at least, experience significant delays before it obtains that form of interconnection, delaying the time when it can provide service.

Under Section 252(a), states are required to review existing interconnection agreements.[59] The statute does not, however, establish the standard to be used by state commissions in judging the reasonableness of these agreements. Consequently, this Commission can either adopt the standards for state arbitration of disputes between carriers under Section 252(e)(2)(B) or the standards for state review of negotiated agreements between carriers under Section 252(e)(2)(A).

As Vanguard previously has demonstrated, virtually all interconnection agreements between LECs and cellular carriers were entered into under coercive circumstances and do not reflect freely negotiated agreements.[60] Therefore, it is appropriate to review existing LEC/CMRS interconnection agreements under the same standards that apply to arbitrations, *i.e.*, the pricing standards contained in Section 252(d), rather than the "public interest" standard that applies to negotiated agreements. These standards reflect Congressional expectations of the range of reasonable results from the negotiation process and therefore are the best standards for reviewing agreements that predate the 1996 Act.

Review under the standards that apply when the state arbitrates disputes between carriers also will provide LECs an incentive to negotiate new, more reasonable, agreements with co-carriers prior to the review process. To date, this has not happened and incumbent LECs have made every effort to conceal the terms of existing agreements while suggesting that those agreements should be rubber-stamped by state commissions. For example, in Kentucky and Virginia, incumbent LECs are resisting efforts by AT&T to obtain disclosure

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59/ 47 U.S.C. § 252(a)(1).

60/ Vanguard CMRS Comments at 7.

of all existing interconnection agreements.[61/] U S West is taking the other approach, insisting that existing CMRS interconnection agreements were entered into voluntarily and therefore are not subject to the negotiation and arbitration process.[62/] In light of these examples, it is evident that incumbent LECs will be able to avoid conforming their existing interconnection agreements to the substantive requirements of Sections 251 and 252 unless they are forced to do so. Accordingly, if the Commission determines that LEC/CMRS interconnection is subject to Sections 251 and 252, it must require state commissions to review existing agreements between LECs and CMRS providers pursuant to the standards contained in Section 252(e)(2)(B).

VI. UNBUNDLED ELEMENTS MUST BE MADE AVAILABLE TO ALL TELECOMMUNICATIONS PROVIDERS, INCLUDING CMRS PROVIDERS, ON REASONABLE TERMS AND CONDITIONS. [*Notice* Part II(B)(2) ¶¶ 49-157].

Key points:

- The 1996 Act requires incumbent LECs to make their network elements available to CMRS providers on an unbundled basis.
- Allowing competing carriers to purchase, at reasonable, cost-based prices, access to only those network elements they need will allow competitors to build their networks over time in the most efficient manner. In addition, the broad availability of unbundled elements is likely to lead to more reasonable pricing of LEC retail services.

61/ *See Telecommunications Interconnection Agreements Pursuant to the Telecommunications Act of 1996*, Administrative Case No. 358 (Kentucky Pub. Serv. Comm'n, adopted April 29, 1996); Petition of AT&T Communications of Virginia, Inc. to Direct Bell Atlantic-Virginia, Inc. to Immediately File with the Commission and Make Public All of Its Interconnect Agreements and Arrangements, Case No. PUC 960022, filed on April 4, 1996, before the Virginia State Corporation Commission.

62/ *See* U S West CMRS Interconnection Letter at 1.

As part of its framework for promoting competition in the market for local exchange services, the 1996 Act requires incumbent LECs to make their network elements available to all telecommunications providers on an unbundled basis. Section 251(c)(3) of the 1996 Act requires incumbent LECs:

> to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 . . . .[63/]

Under the terms of the 1996 Act, incumbent LECs must provide such unbundled elements in a manner that "allows requesting carriers to combine such elements in order to provide such telecommunications service."[64/]

As telecommunications carriers for purposes of the 1996 Act,[65/] CMRS providers are entitled to purchase network elements from incumbent LECs on an unbundled basis. Given this plain statutory requirement, the incumbent LECs' obligation to make network elements available to CMRS providers on an unbundled basis is not affected by the jurisdictional issues that apply to transport and termination.[66/] In fact, rather than limiting the unbundling

63/ 47 U.S.C. § 251(c)(3).

64/ *Id.*

65/ The 1996 Act defines a telecommunications carrier as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications . . ." 47 U.S.C. § 153(49). Telecommunications, in turn, is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

66/ In particular, no conflict exists between incumbent LECs' unbundling obligations under Section 251(c) of the 1996 Act and Section 332 of the Communications

(continued...)

obligations of incumbent LECs, the Commission should take care to assure the broad availability of such elements in the present proceeding.

The broad availability of unbundled elements of incumbent LEC networks will have public interest benefits for both consumers and carriers alike. As the Commission recognized in the *Notice,* the ability of competing carriers to purchase, at reasonable, cost-based prices, access to only those network elements that are needed will allow competitors to enter LEC markets gradually by building their own networks over time.[67/] Moreover, with the broad availability of unbundled elements of the incumbent LEC's network, new entrants will be able to purchase access to those network elements the incumbent LEC provides most efficiently, while constructing their own facilities where such construction would be more efficient.[68/]

The broad availability of unbundled elements also is likely to lead to more reasonable pricing of LEC services that are similar to unbundled elements. In many cases, the availability of unbundled elements will permit carriers to purchase only the services they need, rather than bundled offerings that contain services that are unnecessary for a particular task.[69/] Indeed, the Commission's tentative conclusions in the *Notice* are confirmed by Vanguard's experience.

66/ (...continued)
Act, as these provisions deal with entirely different sets of issues.

67/ *Notice* at ¶ 75.

68/ *Id.*

69/ This was one of the key promises of the Commission's Open Network Architecture policies, which failed because the Bell Operating Companies resisted fundamental network unbundling. The Commission should not permit history to repeat itself in this proceeding.

Today, Vanguard is required to purchase retail services from LECs for, among other things, interswitch transport. The charges for these services are high and, in some cases, appear to have been deliberately inflated.[70/] If Vanguard could purchase equivalent unbundled elements under Section 251(c)(3), with prices that are based on cost, then LECs would be unable to overprice their retail services, and prices for retail services would be pushed towards their actual costs. These price reductions would benefit Vanguard, but they also would benefit other users of these services. Thus, there will be significant public interest benefits to ensuring that unbundled elements are available on a non-discriminatory basis to all telecommunications carriers.

VII. THE COMMISSION SHOULD ADOPT RULES TO PREVENT UNREASONABLE OUTCOMES IN STATE PROCEEDINGS UNDER SECTION 252. [*Notice* Parts II(F), III(A), ¶¶ 260-261, 264-268].

Key points:

- The Commission must establish a national paradigm for the state arbitration and adjudication process to enforce national interconnection and access parameters.
- If states are not required to align their proceedings with a national paradigm, they could erect *de facto* barriers to competition by adopting unfair results in the arbitration and adjudication process.
- The Commission must limit the scope of issues in the state arbitration process to safeguard competitors from LEC abuse of market power, which otherwise may enable LECs to exploit their disproportionate bargaining power to implement one-sided and unfair interconnection agreements.

70/ For instance, in one case Vanguard was significantly overbilled for facilities construction charges. When Vanguard pointed out the error, the monopoly carrier responded by agreeing to remove the charge but simultaneously adding new charges it had "forgotten" to include in the original bill, and that exceeded the original erroneous charge. It would appear that the "forgotten" charges were imposed largely as a penalty for Vanguard's complaint about being overcharged.

- The Commission should require a "final offer" arbitration principle and permit post-offer negotiation to limit an incumbent LEC's ability to abuse the arbitration process while according the parties sufficient negotiation flexibility.

- The Commission must require rural carriers to bear the burden of proof to show they are entitled to an exemption from the 1996 Act's interconnection duties because an interconnection request is technically infeasible or economically unreasonable.

- The Commission should establish national rules to require that rural carriers provide interconnection at just, reasonable and nondiscriminatory cost-based rates, terms and conditions to CMRS providers under Section 332 of the Act.

There can be no doubt of the importance of the substantive rules the Commission will adopt to implement Sections 251 and 252. At the same time, the Commission must not neglect the State role in implementing those substantive requirements. The States will be the first point of regulatory contact for disputes over the meaning of the rules and will have a significant impact on the outcome of intercarrier negotiations. Consequently, the Commission should adopt specific procedural requirements to govern State determinations under Sections 251 and 252. These requirements should address both the arbitration process and the requirements for State consideration of rural telephone companies' requests for exemption from the obligations of LECs under the 1996 Act.

A. The Commission Should Limit the Scope of Issues to Be Considered in State Arbitrations and Adjudications.

Having set the parameters for determining incumbent LEC costs and technical terms of transport and termination and unbundled elements, as described above, the Commission also must adopt national rules to require states to focus the scope of issues to be considered in state arbitrations and adjudications under Section 252 of the 1996 Act. Failure to adopt uniform federal rules will allow states to erect *de facto* barriers to competition by adopting unreasonable outcomes in arbitrations and adjudications. Adopting a uniform federal arbitration and adjudication paradigm with strong enforcement policies also will produce competitive benefits by encouraging incumbent LECs voluntarily to negotiate interconnection agreements in good faith and facilitating the expeditious conclusion of interconnection agreements.

If states are not required to conform their Section 252 arbitration and adjudication processes to a uniform national model, the national pricing models for transport and termination and network unbundling adopted in the 1996 Act will be eviscerated. The reason that specific requirements are necessary is that incumbent LECs will be able to exploit their market power to skew the negotiation process to arrive at one-sided and discriminatory interconnection arrangements unless a national paradigm is enforced.[71/] As one Justice Department official has explained:

> You've got companies that are trying to compete who have to negotiate with monopolies . . . . To the extent you can narrow [interconnection negotiation] parameters, you can make that situation more tenable.[72/]

Adopting a uniform national paradigm to focus state arbitration and adjudication procedures will limit the ability of LECs to exploit market power and undermine attempts by new entrants to obtain just, reasonable and nondiscriminatory interconnection, transport and termination and unbundled elements through the negotiation process.

Without uniform federal parameters, however, states could erect *de facto* barriers to competition by adopting unreasonable outcomes in arbitrations and adjudications. Texas law,

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71/ The Commission has held that "a firm controlling bottleneck facilities has the ability to impede access of its competitors to those facilities." *See Competitive Carrier I*, 85 F.C.C.2d at 21.

72/ *See* Edmund L. Andrews, *Justice Dept. Vows Scrutiny of Bell Deals*, N.Y. TIMES, Apr. 29, 1996, at D1 (quoting Justice Department official).

for example, effectively precludes interexchange carriers seeking to provide competitive local exchange service from obtaining interconnection to Southwestern Bell's network, instead requiring the IXCs to build their own "large and costly networks."[73/] The Texas law also would prohibit Southwestern Bell from offering competitors more than a 5 percent discount on retail prices for its network services and facilities. *Id.* Other states have imposed certification and/or licensing requirements on wireless carriers that will hamper their ability to obtain competitively priced interconnection with incumbent LECs.[74/] Still other states have abdicated their role in regulating wireless carriers, while extending favorable local competition rules to landline carriers.[75/] Allowing state action or inaction to erect *de facto* barriers to competition would violate the requirement in Section 253 of the 1996 Act that the Commission preempt any state barriers to entry. *See* 47 U.S.C. § 253.

Furthermore, it is appropriate for the Commission to adopt arbitration requirements that define the scope of arbitration. First, many states currently do not have arbitration

73/ *See* Albert R. Karr, *Texas Defies Washington in Phone Deregulation, Protecting Its Local Bell Against Giant Rivals*, WALL ST. J., May 2, 1996, at A16.

74/ *See* Alaska-3 Cellular LLC d/b/a Cellular One, Motion for Declaratory Ruling Concerning Preemption of Alaska Call Routing and Interexchange Certification Regulations as Applied to Cellular Carriers, File No. WTB/POL 95-2, filed on September 22, 1995 (Alaska PUC may require cellular carrier to obtain certificate as an intrastate IXC to transmit cellular calls carried within its RSA that would be intrastate toll calls if carried on the landline network); *see also* Pittencrieff Communications, Inc. Petition for Declaratory Ruling Regarding Preemption of Texas Public Utility Regulatory Act of 1995, filed on January 11, 1996 (Texas statute imposes "significant revenue-based fee" on CMRS providers).

75/ *See, e.g.*, *Implementation of the Omnibus Budget Reconciliation Act of 1993*, Declaratory Order, Interim Rules and Proposed Rulemaking, Docket No. L-00950104, at 5-6 (Pennsylvania PUC, adopted June 8, 1995) (the definition of "public utility" in 66 Pa. C.S. § 102 was amended in 1984 to remove the Pennsylvania PUC's regulatory authority over cellular industry); *see also Connecticut DPUC Order; see generally supra* note 21.

procedures in place.[76] Adopting national requirements thus will reduce the procedural burden of defining arbitration procedures in every state. National requirements also will prevent new entrants from having to learn and apply inconsistent sets of arbitration rules as they seek to obtain interconnection across the country.

In addition, the Commission's arbitration paradigm should encourage negotiated settlements. For instance, arbitrators should not be allowed to reach decisions that are not within the parameters or rules adopted by the Commission. Such an outcome would violate the requirement in Section 251(d)(3) of the 1996 Act that state regulation be consistent with Commission interconnection policies and the purposes of the 1996 Act. *See* 47 U.S.C. § 251(d)(3). Equally important, requiring arbitrations to conform to the Commission's substantive rules will prevent carriers, especially incumbent LECs, from trying to game the negotiation and arbitration process.

Vanguard also supports the *Notice's* tentative proposal to require "final offer" arbitration, subject to the requirements of national parameters, whereby each party to a negotiation proposes its best and final offer and the arbitrator adopts one of the two proposals. *See Notice* at ¶ 268. "Final offer" arbitration, subject to the requirements of national parameters will encourage reasonable positions and will encourage negotiating parties "to present terms and conditions that approximate the economically efficient outcome." *See id.*

76/ *See* Implementation of the Telecommunications Act of 1996, *Tentative Decision*, Pa. Pub. Util. Comm., Docket No. M-00960799, Mar. 14, 1996 (requesting comment on establishment of arbitration procedures to implement Section 252).

In addition, the Commission should permit negotiation to continue after arbitration offers are exchanged to promote negotiated settlements. It is well-settled that allowing parties to engage in post-offer negotiations is conducive to a meeting of the minds.[77/] Furthermore, permitting post-offer negotiations will provide the parties with additional flexibility to tailor counter-proposals based on new information.

B. The Commission Should Establish Rules to Prevent Abuse of the Rural Carrier Exemptions Under the 1996 Act.

Rural carriers should be required to bear the burden of proof to show that they are entitled to exemptions because of technical or financial infeasibility. Furthermore, rural carriers should not be permitted to avoid interconnection with CMRS providers because the basis for CMRS interconnection is contained in Section 332, not in Section 251 or Section 252. In addition, there is no reason to exempt rural carriers from interconnection pricing requirements designed to set charges at or near cost.

Section 251(f) exempts certain rural telephone companies from complying with the 1996 Act's interconnection obligations under certain circumstances specified in the statute. For a rural carrier to benefit from the exemption, the state commission must determine that an interconnection request is economically unreasonable and technically infeasible. To prevent rural carriers from abusing the Section 251(f) exemption to the detriment of interconnectors, the Commission should establish a national rule to require rural carriers to bear the burden of proof before the state to justify application of the exemption by demonstrating that an interconnection request is technically infeasible and economically

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77/ A counter-offer, for example, "carries negotiations on rather than breaking them off." *See* Restatement 2d, Contracts, § 39.

unreasonable. Placing the burden of proof on the party seeking a benefit (in this case, an exemption from regulation) is consistent with existing Commission adjudicatory practice and procedure.[78/]

In implementing a national paradigm to govern interconnection obligations of rural carriers, moreover, the Commission should not permit rural carriers to avoid providing interconnection to wireless carriers. Section 332 of the Act, as amended, established a comprehensive policy for interconnection between LECs and CMRS providers and requires that LECs make interconnection available to CMRS providers on just, reasonable and nondiscriminatory rates, terms and conditions.[79/] Indeed, in enacting the amendments to Section 332, Congress stated that

> the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.[80/]

Consequently, all CMRS providers have a separate and independent right to interconnection from LECs under Section 332, notwithstanding Section 251 and 252 of the 1996 Act. Accordingly, the Commission must not allow rural carriers to distort the purpose of the interconnection provisions of the 1996 Act to evade their pre-existing duty under Section 332

78/ In a formal complaint proceeding, for example, the complainant has the burden of proof. The burden of proceeding (but not the burden of proof) shifts to the defendant once the complainant establishes a *prima facie* case. *See Connecticut Office of Consumer Counsel v. AT&T Communications*, 4 FCC Rcd 8130, 8133 (1989), *aff'd sub nom. Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 1310 (1991).

79/ *See* 47 U.S.C. § 332(c)(1)(B).

80/ Budget Act House Report, at 261, 1993 U.S.C.C.A.N. 588.

to make interconnection available to CMRS providers on just, reasonable and nondiscriminatory rates, terms and conditions.[81/]

The Commission also must not exempt rural carriers from pricing requirements designed to set charges at or near cost. The rural exemption in Section 251(f) does not give rural carriers license to abuse co-carriers with charges that are far above cost. The Commission has adopted rules in the past to prevent anticompetitive abuses, such as jurisdictional cost-shifting, by small rate-of-return carriers.[82/] The Commission thus is justified in adopting a national rule to require that rural carriers not abuse interconnection arrangements by imposing rates on competitors that are far above cost. Such a rule would be consistent with the Commission's long-standing principle that cost-based rates are presumptively reasonable.[83/] To the extent that cost-based interconnection charges create any genuine hardship for rural carriers, these carriers will have recourse to explicit universal

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81/ *See* Reply Comments of Vanguard Cellular Systems, Inc., filed in CC Docket No. 95-185, on March 25, 1996, at 21-23.

82/ The Commission's "all-or-nothing" rule requires that when a rate-of-return company and a price cap company merge, or one company acquires another, the resulting company must comply with price cap regulation within a year of the transaction. 47 U.S.C. § 61.41(c)(2); *see also Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6821 (1990), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *recon.*, 6 FCC Rcd 2637 (1991) ("*LEC Price Cap Reconsideration Order*"), *aff'd sub nom.*, *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993). The Commission adopted the rule to prevent a company from "gaming the system" by shifting costs from its price cap affiliate to its rate-of-return affiliate. *See LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

83/ The Commission practice of requiring public filing of cost support for tariffed rates is well-established. *See* 47 C.F.R. §§ 0.451(a), 0.455(b)(11), 61.38, 61.49; *see also Commission Requirements for Cost Support Material To Be Filed With Open Network Architecture Access Tariffs*, 7 FCC Rcd 1526, 1526 n.6 (1992); *Southwestern Bell Tel. Tariff F.C.C. No. 73, Transmittal No. 2438*, 10 FCC Rcd 12222, 12223 (Tariff Div. 1995).

service subsidies, if appropriate, that the Commission and the States adopt under Section 254.[84/]

VIII. CONCLUSION

For all of these reasons, Vanguard Cellular Systems, Inc. respectfully requests that the Commission adopt rules in accordance with these comments.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.

By: ______________________
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May 16, 1996

84/ 47 U.S.C. § 254.

Exhibit 1

Declaration of Sandy Kiernan
(originally submitted in CC Docket 95-185, March 4, 1996)

DECLARATION OF SANDY KIERNAN

1. I, Sandy Kiernan, am the Carrier Relations Manager of Vanguard Cellular Systems, Inc., headquartered in Greensboro, N.C I have worked at Vanguard since 1993. Part of my job is to assist in negotiations with Interexchange Carriers ("IXCs") and with local exchange carriers ("LECs") for interconnection arrangements.

Negotiation With IXCs vs. Negotiation With LECs,

Preparation

2. In preparing for negotiations with the IXC's, we draft a Request for Proposal (RFP). A RFP is sent to each competitor with which are were familiar. This helps to unify the responses so that the analyses are based on the same criteria. It also gives them a snapshot of our current facilities and how they interact. We request their offerings for our network including the opportunity to offer products or services that may be unique to their company. Since there is currently only one LEC (Local Exchange Carrier) per market, a RFP would not serve the same purpose.

Negotiation

3. By being able to negotiate a contract, it helps us to gather critical information before awarding our business to any one vendor. Negotiations also allow vendors to suggest new ideas and approaches based on our needs that were previously not considered. For instance, Vanguard used to be on a different long distance platform than we are today. Through the RFP process, we chose to be on a software defined network. This allows us to take advantage of several services via the same trunk lines we have in place today. Our previous platform would have required us to install a different trunk for each service. By